UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SAMUEL DILLER, BOBBY ROBERTS, AND MARCUS RONALD YOUNG, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,	§	
Plaintiffs,	§	
vs.	§	CIVIL ACTION NO. H-05-3693
SUNOCO LOGISTICS PARTNERS OPERATIONS., G.P., L.L.C., AND SUNOCO PARTNERS, L.L.C.,	§	
Defendants.	§	

ORDER FOR NOTICE TO POTENTIAL CLASS MEMBERS

This Fair Labor Standards Act[1] (FLSA) case is before the court on plaintiffs' motion for notice to potential class members (Dkt. 14). Defendants have filed a response in opposition to the motion (Dkt. 18).[2] The court finds that for notice purposes plaintiffs have met their burden to show that other similarly situated employees exist.

I. Legal Standards

Section 16(b) of the FLSA permits an employee to bring suit against an employer "for and in behalf of himself ... and other employees similarly situated." 29 U.S.C. § 216(b). Section 16(b) also provides that "No employee shall be a party plaintiff to any such action

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[1] 29 U.S.C. §§ 201, *et seq*.

[2] Defendants have also filed a motion to strike plaintiffs' affidavits (Dkt. 19) as conclusory and hearsay. In response, plaintiffs have filed an objection (Dkt. 27) to defendants' affidavits on similar grounds. Both motions are denied.

unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." *Id.* Unlike a standard class action under Federal Rule of Civil Procedure 23(c), section 216(b) provides an "opt-in" rather than "opt-out" procedure. *See Villatoro v. Kim Son Rest., L.P.*, 286 F. Supp. 2d 807, 809 (S.D. Tex. 2003) (relying on *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1212 (5th Cir. 1995), *overruled on other grounds by Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003)); *H&R Block, Ltd. v. Housden*, 186 F.R.D. 399, 399 (E.D. Tex. 1999).

Courts have discretion to allow a party asserting FLSA claims on behalf of others to notify potential plaintiffs that they may choose to opt-in to the suit. *See Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165, 168-70 (1989); *Jackson v. City of San Antonio*, 220 F.R.D. 55, 62 (W.D. Tex. 2003). This collective action notice should be "timely, accurate, and informative." *Hoffman-La Roche*, 493 U.S. at 172. The standard for this "collective action" notice is more lenient than that for a class action. *See Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1214 (5th Cir. 1995).[3]

While the Fifth Circuit has not endorsed a methodology for this process,[4] most courts, including those in the Southern District of Texas, use the "two-stage" method.[5] The two

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[3] Although *Mooney* was an ADEA case, section 16(b) is incorporated into that statute (29 U.S.C. § 626(b)), and thus the *Mooney* court's analysis is applicable to FLSA collective actions.

[4] *See Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1216 (5th Cir. 1995).

[5] *See, e.g.*, *Thiessen v. General Elec. Cap. Corp.*, 267 F.3d 1095, 1105 (10th Cir. 2001); (continued...)

stages are the "notice stage," and if necessary, the "decertification stage." In the notice stage, the court initially determines whether the proposed class members are similarly situated. *Mooney*, 54 F.3d at 1213. At this stage, the

> district court makes a decision–usually based only on the pleadings and any affidavits which have been submitted–whether notice of the action should be given to potential class members.
>
> Because the court has minimal evidence, this determination is made using a fairly lenient standard, and typically results in "conditional certification" of a representative class. If the district court "conditionally certifies" the class, putative class members are given notice and the opportunity to "opt-in." The action proceeds as a representative action throughout discovery.

Id. at 1213-14 (citation omitted). At the notice stage, "'courts appear to require nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan infected by discrimination.'" *Id.* at 1214 n.8 (citation omitted).

The decertification stage is typically initiated by a motion by the defendant after discovery is largely complete. *Mooney*, 54 F.3d at 1214. If the additional claimants are similarly situated, the court allows the representative action to proceed. *Villatoro v. Kim Son Rest., L.P.*, 286 F. Supp. 2d 807, 809 (S.D. Tex. 2003). If the claimants are not similarly

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[5] (...continued)
Barnett v. Countrywide Credit Indus., Inc., No. 3:01-CV-1182, 2002 WL 1023161, at *1 (N.D. Tex. May 21, 2002); *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987); *Villatoro v. Kim Son Rest., L.P.*, 286 F. Supp. 2d 807 (S.D. Tex. 2003) (J. Atlas); *Paisley v. Lincoln Prop. Co.*, H-04-4173, Dkt. 13 (S.D. Tex. 2005) (J. Hittner); *Gardner v. Associates Commercial Corp. & Assocs. Corps. of N. Am.*, H-00-3889, Dkt. 12 (S.D. Tex. 2000) (J. Harmon).

situated, the court decertifies the class, and the opt-in plaintiffs are dismissed without prejudice. *Id.*

Whether employees are "similarly situated" for purposes of the FLSA is determined in reference to their "job requirements and with regard to their pay provisions." *Dybach v. Florida Dep't of Corr.*, 942 F.2d 1562, 1567-68 (11th Cir. 1991). A plaintiff need only demonstrate a reasonable basis for the allegation that a class of similarly situated persons may exist. *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 (11th Cir. 1996). However, at least some evidence beyond unsupported factual assertions of a single decision, policy, or plan should be presented. *H&R Block, Ltd. v. Housden*, 186 F.R.D. 399, 400 (E.D. Tex. 1999).

II. Background Facts

The following facts are undisputed unless otherwise noted. Plaintiffs worked for Sunoco[6] as "Control Center Supervisors" (controllers)[7] in Tulsa, Oklahoma.[8] Their primary

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[6] Defendants represent that plaintiffs, and all potential class members, were employed by Sunoco Partners, L.L.C., not Sunoco Logistics Partners Operations, L.L.C. Interestingly, Margaret Sofio's Affidavit, Exhibit 1 to defendants' response, states "Sunoco Logistics never employed any of these aforementioned Plaintiffs or former Plaintiffs or any of the Pipeline Controller positions at issue in Plaintiffs' lawsuit," while Todd DeIuliis's Affidavit, Exhibit 2 to defendants' response, states "I have worked for Sunoco Logistics . . . the employer of Samuel Diller, Bobby Roberts, Clyde E. Rogers, Jimmy Wise, Barbara Van Orman, and Marcus Ronald Young, since 1987." There is no pending motion to dismiss Sunoco Logistics. The court refers to defendants collectively as "Sunoco" for purposes of the instant motion.

[7] Sunoco refers to these employees as "Pipeline Controllers," which is apparently the more recent title given to such employees. The court uses the term "controllers" for simplicity.

[8] Diller was employed by Sunoco from March 1, 2004 to March 1, 2005, Roberts from March 1997 to February 2004, and Young from 1978 to 2004.

job duties consisted of monitoring and controlling pipelines, which included starting and stopping pumps, closing pump valves, changing pipeline products, and monitoring pressure and changes in pipeline contents and controls (including temperature). Sunoco operates approximately 3,570 miles of pipeline in eight states[9] out of its Western Area Control Center, which until January 2006 was located in Tulsa.[10] The Western Area Control Center is operated by a rotating shift of 21 controllers ranging from grade II to VI. Plaintiffs were all grade III or IV controllers.

Sunoco also has an Eastern Area Control Center in Pennsylvania, staffed with a rotating shift of 21 controllers. There are a few differences between the East and West with regard to rotating work shifts, configuration of monitoring consoles, and computer software. However, the job functions and pay scheme for controllers in the East are the same as those for controllers in the West.

Plaintiffs allege they worked an average of 42 hours per week and were not paid overtime because Sunoco wrongly classified them as "exempt" from the FLSA's overtime requirements. Plaintiffs contend that as controllers, they did not exercise discretion and were not relatively free from supervision. Plaintiffs allege that in January 2005 Sunoco reclassified some controllers and began paying them on an hourly basis and compensating them for overtime. Plaintiffs have submitted affidavits stating that through their participation

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[9] Oklahoma, Texas, Louisiana, Arkansas, Mississippi, Tennessee, Kentucky, and Ohio.

[10] The Western Area Control Center is currently located in Sugar Land, Texas.

in company-wide meetings they learned that other Sunoco controllers were not compensated for overtime hours pursuant to the same policy. In addition, two potential opt-in plaintiffs, Jimmy Wise and Phil Stillson, have submitted affidavits supporting plaintiffs' allegations.

Plaintiffs seek to send notice of this FLSA collective action to "All current and former control center supervisors employed by Sunoco at any time during the time period of February 6, 2003 to present who were denied overtime compensation for hours worked in excess of forty (40) in a work week." Plaintiffs seek an order requiring Sunoco to provide the names and addresses of all such employees to facilitate this notice.

Sunoco emphasizes that not all controllers were reclassified as non-exempt in January 2005. According to Sunoco, only trainee (grade II) controllers were reclassified then, while grade III and IV controllers were consistently classified as exempt under the administrative exemption,[11] before and after January 2005.

Sunoco disputes that administrative exemption cases such as this are appropriate for collective action, and that plaintiffs are similarly situated to other controllers. Sunoco contends that controllers must engage in individualized decision-making based on personal experience. Controllers are given pumping orders daily from Schedulers telling them how much product to deliver to a terminal; in managing pumping orders, controllers have to decide how to prioritize these orders. When faced with an abnormal pressure reading,

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[11] Under 29 C.F.R. § 541.200(a), an employee is exempt if (i) the employees primary duty is the performance of office or non-manual work directly related to management or general operations of the employer, and (ii) the employee exercises discretion and independent judgment with respect to matters of significance.

controllers have to decide whether to shut down the facility and investigate. Controllers also exercise discretion in how to monitor pipeline integrity; each will approach this monitoring differently by focusing on various operating efficiencies. Finally, a new controller will be responsible for monitoring only one console, while a more experienced controller will monitor two consoles. For these reasons, Sunoco disputes plaintiffs' assertions that controllers are similarly situated to each other, and that they do not exercise discretion in their jobs.

Alternatively, Sunoco argues that to the extent the court determines that notice to any potential class members is appropriate, the class should be limited to grade III and IV controllers who worked in Tulsa. Finally, Sunoco asserts that Diller is not a proper representative because he has a conflict of interest. Diller is currently the defendant in a lawsuit by Sunoco for reimbursement of relocation expenses conditionally paid to Diller before he terminated his employment. Sunoco does not object to the other two named plaintiffs.[12]

III. Analysis

Plaintiffs are not seeking to include grade II trainees in the proposed class.[13] The parties do not dispute that grade II trainees were reclassified as non-exempt in January

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[12] Beyond objecting to the scope of the class to be notified, Sunoco makes no objections to specific provisions of the proposed notice, attached as Exhibit E to plaintiffs' motion.

[13] Plaintiffs counsel represented on the record in open court at the May 2 hearing that grade II controllers are not a part of the proposed class.

2005.[14] The parties also do not dispute that grade III and IV controllers were classified by Sunoco as exempt employees both before and after January 2005.[15] It is plaintiffs' position that Sunoco wrongly classified grade III and IV controllers as exempt employees at all times relevant to this lawsuit.

The court finds that plaintiffs have met their burden for conditional certification and notice to potential class members as to grade III and IV controllers. Whether or not plaintiffs ultimately can *prove* that they were wrongly classified as exempt is not the issue for notice purposes.

Plaintiffs' submissions, as well as Sunoco's, indicate that other potential class members exist. Plaintiffs have presented the affidavit of two potential opt-in class members, Jimmy Wise and Phil Stillson,[16] who claim to have been denied overtime pay while employed by Sunoco as controllers. In addition, plaintiffs' affidavits include the names of controllers that plaintiffs allegedly know to have complained to management about not being paid overtime. The statements in the affidavits regarding other employees are not proof that controllers were wrongly classified as exempt, but do support plaintiffs' belief that other

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[14] Margaret Sofio Affidavit, Exhibit 1 to defendants' response, at ¶¶ 4-5; Todd DeIuliis Affidavit, Exhibit 2 to defendants' response, at ¶ 12.

[15] At the May 2 hearing, counsel clarified that grade III and IV controllers were reclassified back in the 1980s, but the January 2005 classification change did not effect them. However, as of January 2005, Sunoco did implement a new policy of providing "extra shift pay" to controllers, who remained exempt employees paid on a salary basis, to compensate them for work over and above a certain number of hours.

[16] Because Wise was employed as a controller from 1996 until 2006, and Stillson from 1984 to 2005, the court presumes neither was a grade II trainee during the relevant time period.

employees engaged in the same position were paid in the same way as plaintiffs and might want to opt-in to this action.

Sunoco's lengthy description and chart setting forth the duties of controllers is evidence that controllers vary in the daily execution of their duties, but actually serve to reinforce the concept that controllers at the same grade levels are responsible for the same job functions. It is also evident that despite some organizational differences, controllers in the Eastern Area Control Center perform the same job functions as those in the West. All controllers are guided by the same operations manuals and brochures. Further, Sunoco does not dispute that all controllers other than grade II trainees, wherever located, were paid in the same way, *i.e.*, that Sunoco considered them exempt from the FLSA's overtime pay requirements, but as of January 2005 did begin providing them compensation in the form of "extra shift pay."

While determining the application of the administrative exemption may in some cases require a "'case by case'" review of the employee's degree of discretion and independent judgment," as argued by Sunoco,[17] in this case the potential need for individual assessment does not weigh against notification. At this juncture, plaintiffs need only make "substantial allegations that the putative class members were together the victims of a single decision, policy, or plan." *Mooney*, at 1214 n.8; *Clarke v. Convergys Customer Mgmt. Group, Inc.*, 370 F. Supp. 2d 601, 605 (S.D. Tex. 2005) (plaintiffs must demonstrate "some factual nexus

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[17] Defendants' response, at 3.

which binds the named plaintiffs and the potential class members together as victims of a particular alleged [policy or practice]."). The cases cited by Sunoco for the proposition that administrative exemption cases such as the instant case are not appropriate for collective action, aside from being issued by district courts outside this jurisdiction, are not factually analogous to the instant case.

In *Morisky v. Pub. Serv. Elec. and Gas Co.*, 111 F. Supp. 2d 493, 497 (D.N.J. 2000), plaintiffs, who worked in various departments and had various job titles, sought notice for a broad class consisting of "all non-supervisory, non-professional employees of defendant" of a certain salary grade. Moreover, in *Morisky*, the case had already proceeded beyond the discovery stage and therefore the court applied a stricter standard to certification of the class. *Id.* at 498.

In *Mike v. Safeco Ins. Co. of America*, 274 F. Supp. 2d 216, 221 (D. Conn. 2003), the court held that the plaintiff had not met his burden to provide "evidence of a common thread binding his proposed class of employees." The plaintiff had alleged that while the job description for his position, Field Claims Representative, included administrative tasks, he personally spent most of his time performing non-administrative functions. But he presented no evidence that the same was true of other Field Claims Representatives. The court concluded that "Mike does not challenge a Safeco policy, but rather asserts that Safeco treated him in a certain way." *Id.*

Plaintiffs in *Holt v. Rite Aid Corp.*, 333 F. Supp. 2d 1265 (M.D. Ala. 2004), sought nationwide notice to all store managers and assistant store managers of Rite Aid, a company operating 3,400 stores in 28 states. Like *Mike*, *Holt* involved a claim that the plaintiffs were engaged in job duties different from those described in the job classifications for store managers and assistant managers. The court framed the issue as whether "the evidence of the Plaintiffs' job duties is merely anecdotal evidence specific to them, or can be more broadly applied." *Id.* at 1272. Plaintiffs' evidence was insufficient to show that store managers and assistant managers in stores across the country performed the same tasks. *Holt*, like *Mike*, was a case in which much discovery had been completed and substantial evidence was before the court. The defendants presented uncontradicted evidence that there was much variance in the jobs performed by store managers and assistant managers across the country. The court therefore declined to certify a collective action. *Id.* at 1274. This case, which involves a potential maximum class of 70 controllers[18] located in only two control centers, simply does not present the magnitude of job variance that was present in *Holt.*

This case also is not like *Hall v. Burk*, No. Civ. 3:01CV2487, 2002 WL 413901, *3 (N.D. Tex. March 11, 2002), relied upon by Sunoco. Hall did not provide affidavits from any potential opt-in plaintiffs, nor did her own affidavit give any basis for her conclusory statement that there were other similarly situated employees. Furthermore, the defendant in

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[18] Counsel for the parties agreed at the May 2 hearing that, while not precise, 70 is a good faith estimate of the total number of potential class members.

Hall asserted that all other possible plaintiffs had been paid and signed releases, casting serious doubt on whether any potential opt-in plaintiffs existed. Here, plaintiffs' affidavits explain that the allegation that similarly situated potential plaintiffs exist is based on meetings at which plaintiffs spoke with other employees, and on knowledge that other employees, identified by name, complained about the lack of overtime pay.

The court finds that plaintiffs have met the lenient standard for showing the existence of similarly situated employees who may want to opt-in to this collective action. Therefore, plaintiffs are entitled to discovery from Sunoco of contact information for potential class members.

As to Diller's status as a representative plaintiff, plaintiffs concede that there is no prejudice to them if Diller is removed as a named party and allowed to participate as a class member. In order to avoid the appearance of any conflict, Diller will be removed as a named plaintiff and identified on the docket for this case as an opt-in plaintiff.

IV. Conclusion and Order

For the reasons explained above, it is hereby

ORDERED that plaintiffs' motion for notice to potential class members (Dkt. 14) is granted. It is further

ORDERED that the parties shall within 10 days of the date of entry of this order submit an agreed form of notice. In accordance with this Order, notice will be limited to Sunoco (as defined by the parties' stipulation) employees who worked as grade III and IV

controllers in the Western and Eastern Area Control Centers during the period February 6, 2003 through present who are classified as exempt employees and thus denied overtime pay for hours worked in excess of 40 hours in a work week (other than "extra shift pay").

It is further

ORDERED that defendants shall provide plaintiffs within 20 days of the date of entry of this order, with the name and last known address of all potential members of the above defined class. Sunoco shall provide the information in usable electronic form if possible. It is further

ORDERED that defendants' motion to strike (Dkt. 19) is denied and plaintiff's objection to defendants' evidence (Dkt. 27) is overruled. It is further

ORDERED that the clerk of this court is directed to amend the docket in this case to remove Samuel Diller as a plaintiff named in the caption of this case, and to identify Diller as an opt-in plaintiff.

Signed at Houston, Texas on May 5, 2006.

Stephen Wm Smith
United States Magistrate Judge